No. 22669

In the

United States Court of Appeals

For the Ninth Circuit

HONORABLE WILLIAM H. GOODING, Judge of the Superior Court of the State of Arizona, and ROBERT K. CORBIN, County Attorney of Maricopa County, Arizona,
Appellants,

vs.

RON KENT HOOPER and PURVIS OLE SCROGGS,
Appellees.

STATE OF ARIZONA EX REL. ROBERT K. CORBIN,

vs.

UNITED STATES DISTRICT COURT and HONORABLE WALTER E. CRAIG.

Brief of Appellees

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TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Pages

Pages

STATUTES AND RULES

OTHER

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JURISDICTION

This is an action for an injunction filed on February 26, 1968. An answer was filed on March 7, 1968. A temporary restraining order was issued, followed by a preliminary injunction, both by Judge Walter Craig. Findings of fact, conclusions of law, and a preliminary injunction were reduced to writing on March 19, 1968, (appended to this brief as Appendix A) and appeal immediately followed.

The jurisdiction of the trial court is the subject of discussion in the brief following. The matter came on before this Court after the date of the oral preliminary injunction, but before the final written order; appellants applied to this Court for a writ of prohibition or mandamus, and made an application for a restraining order. On March 12, this Court declined to enter a restraining order but docketed the matter to be considered both as an application for an extraordinary writ and as an appeal on the merits from an interlocutory injunction. Incontrovertibly, this Court has jurisdiction of the appeal under 28 U.S.C. § 1292; for reasons to be developed in the brief following, it does not have jurisdiction for a special writ. Other jurisdictional problems are considered in the brief following.

STATEMENT OF THE CASE

Because of the unusual expedition of this case, we do not have a paged record to which references can be made. However, the matter was comprehensively summarized in the findings of fact and conclusions of law of the trial court. The factual matters are wholly uncontroverted, being taken from the record as made before the trial court on which the defendants offered no factual opposition. We therefore append the findings, conclusions and judgment here, with this brief, and summarize the matter in this Statement by reference to those findings and to the trial court record.

The appellee Hooper is a young attorney, practicing in Phoenix, Arizona. Scroggs is a bail bondsman, also of Phoenix. Hooper and Scroggs were charged with having committed certain crimes involving stolen property under the laws of the State of Arizona. In the Arizona practice, determination of probable cause may be made either by a grand jury or by a magistrate, and under the latter practice, a Superior Court Judge may sit as a magistrate. In the

instant case, that is what happened—the Honorable William H. Gooding, a Judge of the Superior Court, did sit as a magistrate to determine in a preliminary hearing whether there was probable cause to bind Hooper and Scroggs over for trial.

As this preliminary hearing was at its earliest stage, the appellees moved "for an order excluding all persons, except witnesses when testifying" from the preliminary hearing. This motion was based on the court's claimed inherent power to control judicial proceedings. Before this motion came on, some hours of oral testimony had been taken on other motions, and in addition, various exhibits were tendered. The principal witness for the prosecution had earlier testified that she had been convicted on numerous occasions for sexual and drug offenses. She also had testified that she had made bargains with law enforcement authorities to dismiss nearly thirty charges pending in Arizona against her and her husband. Other testimony earlier heard by the court included her extremely derogatory remarks about Hooper's legal abilities.

The State trial court, after considering the entire record, concluded in substance that there had been substantial pretrial publicity as to matters pending before the court; that there would be evidence produced at the preliminary hearing which might very well not be admissible at the time of trial if there were to be a trial; and that there was a substantial likelihood of interference with the plaintiffs' right to a fair trial by an impartial jury by pretrial publicity. The court also concluded that an open hearing would be destructive of the professional and business reputations of the appellees.

In these circumstances, the prosecution objected to the closing on one ground only, and this was that, as stated by the County Attorney in the court below, "The Superior

Court does not have discretionary power to close a preliminary hearing." This result was supposed to follow from a recent amendment to Rule 27 of the State Rules of Criminal Procedures of the Supreme Court of Arizona. Prior to its amendment, Rule 27 had read as follows:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined. The magistrate shall also, upon the request of the defendant, exclude from the examination every person except attorneys in the case, and officers of the court."

On January 29, 1968, the Supreme Court of Arizona had eliminated the last sentence, which, on its face at least, would appear to take from defendants a privilege which they previously had to have hearings closed. The prosecution contended that somehow this elimination of the right of the defendant also deprived the trial court of any discretion to close the proceedings, and this same position was taken on the record in the court below.

This view was adopted by the State trial judge. He held that by virtue of the amendment—not by its language, but by the circumstances of its adoption—he was deprived of the ability to close a courtroom for a preliminary hearing for any purpose.

The precise issue thus presented was whether a Superior Court Judge, sitting as a magistrate, did have discretion in any circumstances to determine whether preliminary hearings should be open or closed. An application for a writ of mandamus, which carefully did not attempt to direct how the discretion of the trial judge should be exercised, but

merely to require him to exercise his discretion in some manner, was filed with the Court of Appeals of the State of Arizona. That Court declined to consider the matter with the suggestion that it be presented instead to the State Supreme Court. Application was thereupon made to the State Supreme Court which declined without comment to enter the writ of mandamus. There is no other remedy available to the plaintiffs in this case under State practice.

In these circumstances, the plaintiffs applied to the Federal District Court for an injunction not against the holding of the hearings, but to restrain the Judge and the County Attorney from proceeding with hearings without the Judge exercising normal judicial discretion to determine whether the hearings should be open or not.*

The District Court found that in the absence of consideration by the State trial court as to whether the preliminary hearing should be conducted in a closed manner, there was a reasonable likelihood that prejudicial news prior to trial would prevent a fair trial. The court also concluded that if the hearings were opened without exercise of discretion by the magistrate, and if he should later conclude that there was no reasonable cause to hold the plaintiffs for trial, then publication of the proceedings injurious to the reputations of the plaintiffs might well be an invasion of their privacy. The court found that there might well be irreparable injury to the appellees.

The District Court was understandably puzzled as to just what it was in State law or practice which might be supposed to deprive judges of their normal discretion. Certainly nothing in Rule 27 says this. He therefore enjoined continuation of the open preliminary hearing, thus permitting the hearing to go on in a closed fashion, but at the same

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*As the oral transcript, but not the pleadings show, Judge Gooding admitted the essential elements of the complaint.

time broadly suggested to the prosecutor that he take the matter to a higher court in Arizona to determine what discretion, if any, State trial judges did have in these circumstances.

This appeal, along with applications for special writs, followed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Rule 27 of the Rules of Criminal Procedure is set forth in the Statement of the Case immediately preceding.

QUESTIONS PRESENTED

1. Can a state constitutionally require that all preliminary hearings in criminal cases, regardless of circumstances, be open to the public and the press? The subsidiary issues are fair trial, equal protection, and right to privacy.

2. Is there federal jurisdiction to enjoin state criminal proceedings in which the state trial judge is barred by state law from exercising his discretion as to whether preliminary hearings should be open or closed?

SUMMARY OF ARGUMENT

The State trial court has held that under the law of Arizona, it has no discretion whatsoever to close a preliminary hearing. That court has found as a fact that conducting an open preliminary hearing is likely to make a fair trial impossible and that there will be great injury to the reputations of the defendants which may be wholly unjustified, but he has nonetheless found that there is nothing he can do about it. The State Supreme Court has declined to disabuse him of this belief, and there is therefore no way whatsoever of preventing a severe denial of the constitutional rights of appellees except by a federal court order.

In these circumstances, the Federal Court has enjoined the State court from proceeding with an open court preliminary hearing until the State Supreme Court can have an effective opportunity to determine whether this unlikely practice really is required by the law of Arizona. The Federal District Court has in nowise interfered with the holding of the preliminary hearing, but it has required that it be closed until the State Supreme Court can speak.

The Federal Court has jurisdiction for this purpose under 28 U.S.C. § 1343, taken in conjunction with 42 U.S.C. § 1983.

This is not a three-judge court case under 28 U.S.C. § 2281, and the trial court was not barred of jurisdiction by 28 U.S.C. § 2283; this is within the jurisdiction because of the irreparable injury, *Dombrowski v. Pfister,* 380 U.S. 479, 483-86, 85 S. Ct. 116, 14 L. Ed. 2d 22 (1965). The so-called "abstention doctrine" does not bar jurisdiction, *Zwickler v. Koota,* ..... U.S. ....., 88 S. Ct. 391, ... L. Ed. 2d ..... (1967), Dec. 5, 1967.

The matter is here on appeal and also on a group of applications for special writs. This Court does have jurisdiction of the appeal under 28 U.S.C. § 1292; it does not have jurisdiction as to the special writs, which should be dismissed.

On the merits, the State trial court and the Federal District Court have both found every fact which would make a denial of due process under *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966). It would be impossible to find a clearer case. In addition, Arizona conducts its preliminary hearings either by grand jury (which is always closed) or by magistrate's hearing which under this local interpretation is always open. This is a denial of equal protection dependent absolutely upon

the arbitrary exertion of power. Moreover, to permit what may be gross slander throughout the community, with no recourse and with no probable cause, is a constitutional invasion of the right of privacy. *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965); *York v. Story,* 324 F.2d 450 (9th Cir. 1963).

The remedy devised by the Federal District Court of permitting the State criminal proceedings to go forward on a closed basis until the State Supreme Court can speak as to the local law is a wise adjustment of the competing state and federal interests.

ARGUMENT

I. Introduction.

Before we go far into this case, we shall necessarily be bogged down in a maze of technicalities of jurisdiction and procedure. But the path must be taken with an eye to the shining light at the end of the trail: the ultimate issue is whether a person charged with crime, as to which there is not yet established probable cause to believe he committed, must in all circumstances be exposed to an open hearing. The issue is whether judges, when they are judging, have any discretion in any case to close hearings to the public. Seldom does an issue so transcend its facts. Inescapably, in deciding the case of the attorney, and the prostitute, and the fur coat, we are also deciding whether the five year old child victim of a sex crime *must* be exposed for the world to see.

It was an odd coincidence that almost to the day that this matter was presented in the State trial court, the American Bar Association House of Delegates was adopting the Reardon Report with an amendment to Section 3.1 on pre-trial hearings. Section 3.1 had previously provided that at any preliminary hearing, a defendant should be permitted

to move that the hearing be closed "on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference." The amendment provided that this should expressly include "representatives of the news media" among those who might be excluded.

The decision of the State trial judge makes compliance with the standards of the Reardon Report impossible in Arizona. But we need not consider the extent to which the Reardon requirements are identical with the requirements of the Constitution of the United States. We have here three express violations of the Federal Constitution by the failure of the trial judge to exercise discretion as to whether the hearing may be closed:

1. There is a deprivation of the right to fair trial in a fair tribunal, expressly held to be a basic requirement of due process in *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966).

2. There is a denial of equal protection of the laws by the difference in treatment between persons charged before a grand jury and persons charged before a preliminary hearing.

3. There is an invasion of the right of privacy, *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

To these grave matters we turn.

II. Jurisdiction in the District Court and Here.

A. JURISDICTION IN THE DISTRICT COURT.

1. The district court had jurisdiction under the Civil Rights Act.

28 U.S.C. § 1343, authorizes the federal district courts to hear issues and proceedings such as are presented here.

> "The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote."

The instant complaint for an injunction falls squarely within paragraphs (3) and (4) as set forth above because the plaintiffs are about to be irrevocably injured as to a "right, privilege or immunity secured by the Constitution of the United States"; the defendant has expressly found this to be true. Furthermore, 42 U.S.C. § 1983, permits a "proper proceeding for redress" to any person about to be deprived under state law of privileges or immunities guaranteed by the United States Constitution. § 1983 reads in full as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Several recent decisions from the various Courts of Appeals affirm that the district courts do have jurisdiction under a complaint alleging injuries and consequences such as are alleged here. At the very minimum, the plaintiffs are entitled to a hearing on the legal issues presented. *Urbano v. Calissi,* 353 F.2d 196 (3d Cir. 1965); *Birnbaum v. Trussell,* 347 F.2d 86 (2d Cir. 1965); *Joe Louis Milk Co. v. Hershey,* 243 F. Supp. 351 (D.C. Ill. 1965); *Harmon v. Superior Court,* 307 F.2d 796 (9th Cir. 1962); *Armstrong v. Rushing,* 352 F.2d 836 (9th Cir. 1965).

In the *Urbano* case, *supra,* the plaintiff alleged under 28 U.S.C. § 1343, and 42 U.S.C. § 1983, that various New Jersey State officials, acting under color of State law, were violating his rights. The district court after reading the complaint dismissed on the grounds that it failed to disclose any basis for jurisdiction. On appeal the decision was reversed, the Third Circuit observing:

> "Plaintiff was entitled to an opportunity to be heard on the legal questions involved in the court's conclusion that the complaint should be dismissed. See Harmon v. Superior Court, 307 F.2d 796 (9 Cir. 1962). The defendants have appropriate means under the Rules of Civil Procedure to move for the dismissal of the action or for summary judgment. At that time both sides will have full opportunity to present their contentions and whatever conclusion the District Judge may arrive at on the merits . . . will have the benefit of the views of the contending parties on the merits and on the jurisdictional question." (353 F.2d at 197).

In *Harmon v. Superior Court,* 307 F.2d 796 (9th Cir. 1962), this Court held that a district court's dismissal of a complaint, on its own motion, without giving the plaintiff an opportunity to be heard was "plain error." The *Harmon* case has direct applicability to this proceeding since Har-

mon alleged in *pro per* that the "Superior Court of California and judges of that court and of the District Court of Appeal of California, who decided a case against appellant, the District Attorney of Los Angeles" and various other state officials deprived him of his constitutional rights as guaranteed him by the United States Constitution. The district court's dismissal of the action for lack of jurisdiction was summarily reversed.

> "Appellant has attempted, however imperfectly, to state a claim under acts of Congress that expressly give the District Court jurisdiction. That court then had jurisdiction. (Addisson, supra; see also Russell v. United States, 9 Cir., 1962, 306 F.2d 402).
>
> "The claim may be, as appellees assert, entirely spurious. The complaint may well not state a claim upon which relief can be granted. It may be that appellant cannot amend to state such a claim. But those are not the questions before us. The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot. As is stated in Bell v. Hood, 1946, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939 (quoted in Addison, supra) '* * * it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction. Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy.' " (307 F.2d at 798).

We submit that the facts as alleged in the instant complaint, particularly in view of the defendant's own findings of constitutional violations in the event of an open preliminary hearing, make this a far stronger case than that pre-

sented by *Harmon* and, manifestly, entitled to this Court's consideration upon a full hearing. In *Armstrong v. Rushing,* 352 F.2d 836 (9th Cir. 1965), also an action under the Civil Rights Act, the court again reversed a summary dismissal of a complaint and asserted that a plaintiff must be given the right to properly present his contentions. See also *Bell v. Hood,* 327 U.S. 678, 66 S. Ct. 773, 90 L. Ed. 939 (1946).

2. The three-judge rule is inapplicable.

28 U.S.C. § 2281 requires that injunction cases come on before three judges in any action "restraining the enforcement, operation or execution of any State statute by restraining the action of any officer" of a State in the enforcement or execution of the statute.

No statute at all is involved in this case. The term is broad enough to cover a variety of types of enactments, *American Federation of Labor v. Watson,* 327 U.S. 582, 66 S. Ct. 761, 90 L. Ed. 873 (1946); but the provision has no application where a valid statute or order is being executed in a manner prejudicial to constitutional rights, *Benoit v. Gardner,* 351 F.2d 846 (1st Cir. 1965). A three-judge court is not required where plaintiffs do not question the constitutional validity of any statute of a State, *Sherwood v. Bradford,* 246 F. Supp. 550 (S.D. Cal. 1965). The order of Judge Gooding is not an interpretation of a State statute or order of general application representing considered State policy; if this is State policy at all, which we doubt, it is unconsidered.

3. The district court is not barred of jurisdiction by 28 U.S.C. § 2283.

28 U.S.C. § 2283 expressly provides that a "court of the United States may not grant an injunction to stay proceedings in a State court" with certain exceptions. In the instant

case, the District Court does not stay proceedings in a State court, it merely conditions its manner. The injunction does control a phase of the operation of the State court by conditioning its right to proceed upon the closing of its doors and the emptying of its courtroom of spectators.

We shall not go into the refinements of what it is that "stays" a proceeding, because it has been overwhelmingly established that § 2283 does not bar an injunction where there is irreparable injury to constitutional rights, *Dombrowski v. Pfister,* 380 U.S. 479, 483-86, 85 S. Ct. 1116, 14 L. Ed. 2d 22 (1965). The strongest of cases against federal interference in state criminal proceedings also affirms that there may be federal jurisdiction in the case of irreparable injury; *Stefanelli v. Minard,* 342 U.S. 117, 72 S. Ct. 118, 96 L. Ed. 138 (1951). When there is genuine and irretrievable damage, federal courts will afford equitable relief even though the result is to forbid criminal prosecutions or other legal proceedings in State courts, *Denton v. City of Carrollton,* 235 F.2d 481 (5th Cir. 1956); and as to the standards of irreparable injury, see *Stevens v. Frick,* 372 F.2d 378 (2d Cir. 1967), *cert. denied,* 387 U.S. 920, 87 S. Ct. 2034, 18 L. Ed. 2d 973 (1967).

If the appellees had any effective remedy in the State court, even by appeal after conviction, appellants could at least argue that there was no jurisdiction in the federal court, though such a contention would be marginal in a case of so extreme a violation of constitutional rights as this. But in the instant case, we have express findings as to irreparable injury. We have a finding that the appellees may not get a fair trial in the State court, should probable cause be found, unless the proceedings are closed. We also have an express finding of invasion of privacy, as to which there could be no remedy after the event.

In these circumstances the District Court had jurisdiction despite § 2283.

4. The "abstention doctrine" did not preclude the exercise of jurisdiction by the district court.

Apart from § 2283, it appears to be contended that somehow, in the general theory of federal-state relations, the trial court was barred from taking jurisdiction by the so-called "abstention doctrine."

We shall not elaborate the argument in the negative because we think it is concluded by the recent decision of *Zwickler v. Koota,* ..... U.S. ....., 88 S. Ct. 381, ... L. Ed. ..... (1967), Dec. 5, 1967. This case specifically holds that a federal district court has no discretion to abstain from deciding the merits of a suitor's claim that a New York statute covering the distribution of political handbills was overly broad. The prayer for a declaratory judgment was coupled with a request for injunctive relief enjoining *future* criminal prosecutions under the challenged State statute. A three-judge court, applying the doctrine of abstention, dismissed the case remitting the plaintiff to the New York courts; the United States Supreme Court in an extensive opinion, reversed without dissent. The case was reviewed because it presented "an important question of the scope of the discretion of the district courts to abstain from deciding the merits of a challenge that a state statute on its face violates the Federal Constitution." In the instant case there is not only an allegation as to violation of several provisions of the Federal Constitution, but, additionally, a finding that these violations will occur unless the defendant exercises his discretion.

In *Zwickler, supra,* the Supreme Court first noted that the Civil Rights Act of 1871, which we invoke in this case, and similar acts expressly gave federal courts a vast range of

power that had lain dormant since 1789. In thus expanding the federal court's power, "Congress imposed the duty upon all levels of the federal judiciary to give due respect to a suitor's choice of a federal forum for the hearing and decision of his federal constitutional claims." The district courts could not escape, in the Court's view, this responsibility simply because State courts also have the responsibility of deciding federal claims. Furthermore, the judge-made doctrine of abstention, promulgated in *Railroad Commission v. Pullman Co.,* 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), sanctions escape from the federal court's duty to decide constitutional issues "only in narrowly limited 'special circumstances'." A recognized special circumstance, relied on by the lower court in *Zwickler* is when the State court may so construe the statute as to avoid or modify the constitutional question. The Supreme Court found no such easy out in *Zwickler* nor is one present here: the defendant and by inaction the State courts have so construed the Arizona practice as to interfere with appellees' federal rights.

The Supreme Court next considered whether the plaintiffs' request for injunctive relief as to *future* state criminal prosecutions constituted a "special circumstance" warranting exercise of the abstention doctrine. The Court held that inclusion of a prayer for injunctive relief did not justify use of the abstention doctrine. In fact, the Court expressly recognized that certain situations—which we submit the instant case presents—may require the exercise of the district court's injunctive powers pending consideration of the constitutional claims. Unless such injunctive relief issues in this case, the plaintiffs' rights or at least a substantial portion of them will be irreparable destroyed.

B. THIS COURT HAS JURISDICTION OF THE APPEAL MATTER ONLY.

The Hooper-Gooding matter was originally brought here on an application for special writ of prohibition or mandamus, with jurisdiction sought under 28 U.S.C. § 1651. While this Court permitted the petitions to be filed, it declined to give a stay and, presumably in the light of our objections to the use of the special writs, directed that the matter be presented also as an appeal. The order of the District Court was readily appealable under 28 U.S.C. § 1292. The record could be and has been swiftly brought here on appeal, and it is essential to any fair understanding of the matter. The writs are not to be used as a substitute for appeal, even though hardship may result from delay, *Schlagenhauf v. Holder,* 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1965); the writs are reserved for extraordinary cases where appeal is clearly inadequate, *Ex parte Fahey,* 332 U.S. 258, 67 S. Ct. 1558, 91 L. Ed. 2041 (1947). Certainly, then, the writs should not be used where appeal is readily available and there is no hint of hardship.

This is particularly true on jurisdictional matters which the lower court is competent to decide and which are reviewable in regular course, *Roche v. Evaporated Milk Ass'n,* 319 U.S. 21, 63 S. Ct. 938, 87 L. Ed. 1185 (1943). The writs will be used only where appellate review would be defeated if the writs were not used, because they issue only in aid of the appellate court's jurisdiction, *CMAX, Inc. v. Hall,* 290 F.2d 736 (9th Cir. 1961).

We suggest that the applications for the writs be dismissed and that the matter be disposed of on the appeal.

We direct the attention of the Court to the existence of a second case, referred to in a few words in paragraph IV. D. of the petition for the special writs in our own case. This matter refers to "another similar petition to the United States District Court for the District of Arizona" in what

is referred to as the *Borquez* case. According to the allegation, a restraining order was issued in that case which had not yet been heard on application for preliminary injunction.

Undersigned counsel do not know, except in the most general sense, what the *Borquez* case is. Presumably, whatever it is will be disposed of by the court below in the light of the opinion of this Court in the Gooding appeal. There is no suggestion in the moving papers of any reason at all as to why an extraordinary writ should be used to preclude the district court from considering an application for a preliminary injunction, particularly where his order on the preliminary injunction would be appealable when entered. Without holding a representation in the matter, therefore, we content ourselves with suggesting that this Court has no proper jurisdiction in the second matter at this stage and that the petition for extraordinary writ in respect to it should be dismissed.

III. The Action of the State Trial Court Denies Appellees the Right to a Fair Trial.

The State trial judge has ruled that he has no discretion to close the preliminary hearing even if the failure will interfere with the defendants' rights to a fair trial by an impartial jury. Our position is simple: the Constitution, and specifically the Sixth Amendment and the Fourteenth Amendment, requires that a presiding magistrate have the discretion to close a preliminary hearing if there is a reasonable likelihood that the failure to close the hearing will interfere with the defendant's right to a fair trial. Any other result, we submit, would force the conclusion that a trial judge may not take appropriate measures to protect a criminal defendant's right to a fair trial.

The Supreme Court of the United States has held that "a fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955); *In re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). In *Sheppard v. Maxwell,* 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966), the Court overturned the conviction because the trial judge had failed to protect the defendant's right to a fair trial from prejudicial publicity. The Court noted that one-sided prejudicial news comment on pending trials "has become increasingly prevalent" and ruled that the responsibility for taking corrective measures lies primarily with the nation's trial judges:

> "Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.*" (Emphasis supplied) 384 U.S. at 362, 86 S. Ct. at 1522.

The *Sheppard* Court suggested several judicial remedies where there was a "reasonable likelihood" that prejudicial pre-trial publicity would interfere with a fair trial, including change of venue, continuance, and granting of a new trial if the publicity arose during the course of the proceedings. Significantly, the Supreme Court did not limit the judge's resources to the enumerated remedies: the courts must take "such steps by rule and regulation that will protect their processes from prejudicial outside interferences." 384 U.S. at 363, 86 S. Ct. at 1522.

Estes v. Texas, 381 U.S. 532, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965), also emphasizes the necessity of nipping pretrial publicity in the bud. The reversal of the conviction was

based in part on extensive television coverage during the trial, but the court also weighed publicity of a pre-trial motion:

> "It is contended that this two-day pretrial hearing cannot be considered in determining the question before us. We cannot agree. Pretrial can create a major problem for the defendant in a criminal case. Indeed, it may be more harmful than publicity during the trial for it may well set the community opinion as to guilt or innocence. Though the September hearings dealt with motions to prohibit television coverage and to postpone the trial, they are unquestionably relevant to the issue before us." 381 U.S. at 536, 85 S. Ct. at 1629.

Chief Justice Warren also emphasized in his concurring opinion that detrimental publicity must be curtailed at the pretrial stage:

> "The parties to this case, and those who filed briefs as *amici curiae,* recognize this, since they treat the televising of the September proceedings as a factor relevant to our consideration. Our decisions in White v. State of Maryland, 373 U.S 59, 83 S. Ct. 1050, 10 L. Ed. 2d 193, and Hamilton v. State of Alabama, 368 U.S. 52, 82 S. Ct. 157, 7 L. Ed. 2d 114, clearly hold that *an accused is entitled to procedural protections at pretrial hearings as well as at actual trial* and his conviction will be reversed if he is not accorded these protections. In addition, in Pointer v. State of Texas, 380 U.S. 400, 85 S. Ct. 1065, 13 L. Ed. 2d 923, we held that a pretrial hearing can have a profound effect on the trial itself and effectively prevent an accused from having a fair trial." 381 U.S. at 567, 85 S. Ct. at 1645 (Emphasis added) (concurring opinion).

The precise action which is urged here has been recommended in American Bar Association Project on Minimum Standards of Criminal Justice, *Fair Trial and Free Press,* Sec. 3.1, p. 7 (Rev. Tentative Draft, July, 1967):

> "In any preliminary hearing, bail hearing, or other pretrial hearing in a criminal case, including a motion to suppress evidence, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public on the ground that dissemination of evidence or argument adduced at the hearing "may disclose matters that will be inadmissible in evidence at the trial and is therefore likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the presiding officer determines that there is no substantial likelihood of such interference."

Several leading cases have underscored the need for the exercise of such discretion. In *People v. Elliott,* 354 P.2d 225, 54 Cal. 2d 498, 6 Cal. Rptr. 753 (1960), the court interpreted a statute identical to the former Arizona statute and indicated that the power to close preliminary hearings has constitutional overtones:

> "This is not a mere insubstantial right. It is, rather, a fundamental safeguard. The testimony heard at the preliminary examination is often that of the prosecution only. The defense may remain silent if it appears that reasonable or probable cause to commit has been established. One of the main purposes of section 868 [the mandatory exclusion provision] is to give the defendant the opportunity of protecting his rights to an impartial and unbiased jury by preventing dissemination of testimony, either by newspaper or other media prior to trial. See Kirstowsky v. Superior Court, 143 Cal. App. 2d 745, 300 P.2d 163. 'The right to unbiased and unprejudiced jurors is an inseparable and inalienable part of the right to a trial by jury guaranteed by the constitution.' Lombardi v. California St. Ry. Co., 124 Cal. 311, 317, 57 P. 66, 68. This right may be substantially impaired if the protection afforded by section 868 is denied." 354 P.2d at 229.

The same conclusion has been reached in New York, where the court extended the provision relating to preliminary hearings to a hearing on a motion to suppress alleged confessions, although no rule directly pertained to such hearings:

> "Because of the posture of any case following a Huntley hearing, the publication of testimony adduced thereon or the conclusions reached by the judge thereafter, where the defendant requests exclusion of the public, would create a reasonable probability of prejudice; and as the courts said in People v. Marturano, 24 A.D. 2d 733, 263, N.Y. S.2d 469, the procedure adopted here along with the attendant wide publicity 'may well have prejudiced defendant's right to a fair trial in the county of venue.'" *People v. Pratt,* 27 A.D.2d 199, 278 N.Y.S.2d 89, 93 (1967).

Five states consider the closing of preliminary hearing doors to be so significant that the judge is directed—without discretion on his part—to exclude all persons except parties upon the motion of the defendant. See, Cal. Pen. Code § 868 (1959); Idaho Code Ann. § 19-811 (1948); Mont. Rev. Codes Ann. § 94-6110 (1947); Nev. Rev. Stat. § 171.445 (1959); Utah Code Ann. § 77-15-13 (1953).* See also, England's newly-adopted Criminal Justice Act of 1967, Sec. 3.

Similar orders such as are requested here have been entered in states where no relevant statutes exist. Similarly,

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*Arizona, of course, has eliminated the provision for mandatory exclusion and now has no relevant provision. See, Rule 27, Ariz. R. Crim. P., as amended:

> "During the examination of any witness, or when the defendant is making a statement or testifying, the magistrate may and on the request of the defendant shall exclude all other witnesses. He may also cause the witnesses to be kept separate and prevented from communicating with each other until all are examined."

at least one Nevada court has excluded the press during a motion to suppress, even though Nevada has no statute directly in point.† Indeed, the Rearden Report specifically so indicates:

> "Even in jurisdictions not having such provisions [for mandatory exclusion], a number of judges responding to the Committee's questionaire indicated that they have had occasion to exclude the public from a pretrial hearing, or from a hearing held during trial outside the presence of the jury; others state that they have frequently gone into chambers on particular matters or held side-bar conferences out of the hearing of those present in the courtroom. In addition, several instances of closed hearings were reported in the press during the period of this study and called to the Committee's attention." American Bar Association Project on Minimum Standards for Criminal Justice, *Fair Trial and Free Press,* p. 115 (Tentative Draft, Dec. 1966)

Other authorities indicate the absence of a mandatory statute does not mean that the court does not have the discretion to exclude persons from the preliminary hearing if substantial prejudice is likely:

> "The Courts have always possessed the power to hold limited closed hearings. The exercise of this power does not constitute an interference with either freedom of speech or freedom of press." Cooper, "The Rationale for the ABA Recommendations," 42 *Notre Dame Lawyer* 857, 861, n. 18 (1967).

See also, 6 Wigmore, *Evidence,* Sec. 1835, p. 338 (3d ed. 1940). Cf., *United States v. Sorrentino,* 175 F.2d 721 (3d Cir. 1949); *United Press Ass'ns v. Valente,* 308 N.Y. 71, 123 N.E.2d 777 (1959).

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†Nev. Rev. Stat. Sec. 171.445 (1959), applies only to preliminary hearings and not to other pretrial hearings.

A further example of a similar order is found in *United States v. American Radiator & Standard Sanitary Corp.*, 272 F.Supp. 691, 702 (W.D. Pa. 1967), where the court interpreted *Estes* and *Sheppard* to give the court discretion to hold *in camera* hearings on pretrial motions even though there was no applicable rule of procedure:

> "The function of the trial court is to conduct the whole proceedings—trial and pre-trial—in an atmosphere of dignity and integrity, so as to shield the trial process itself from external factors.
>
> * * * * * * *
>
> The remedies available to the parties before any harm is done to either side comes not at the time of trial when prejudice to the defendants and injustice to the public may prevail, but now at the inception when notice of such possibilities and likelihoods are presented in formal manner. I deem the time to act in this connection is now." 272 F.Supp. at 702.*

In short, *Sheppard* squarely holds that trial courts must take "strong measures" to insure that a free trial is not abridged because of prejudicial publicity. Judge Gooding has found that it is substantially likely that these defendants' rights will be denied at trial. It is a simple application of basic constitutional law for this Court to hold that, under the circumstances of this case, Judge Gooding has the discretion to hold a closed preliminary hearing and thus preserve defendants' right to a fair trial.

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*In a later opinion in the same case, Judge Rosenberg denied a second motion for a closed hearing, but specifically stated that the denial was based upon the particular facts and not upon any lack of authority on his part. 274 F. Supp. 790.

IV. The Failure of a State Trial Judge to Exercise Discretion as to Whether a Preliminary Hearing Should be Closed Denies Equal Protection of the Laws and Violates the Fourteenth Amendment.

The appellees should not be denied substantial rights solely because of the happenstance that they have been given a preliminary hearing rather than a grand jury proceeding. Any alternative to a grand jury indictment must afford a defendant due process. See *Hurtado v. California,* 110 U.S. 516, 4 S. Ct. 111, 28 L. Ed. 232 (1884); *Beck v. Washington,* 369 U.S. 541, 82 S. Ct. 955, 8 L. Ed 2d 98 (1961); *Morford v. Fogliani,* 411 P.2d 122 (Nev. 1966), *cert. denied,* 385 U.S. 963, 87 S. Ct. 399, *rehearing denied,* 385 U.S. 1021, 87 S. Ct. 721 (1967). If the prosecution had proceeded under the grand jury provisions of the Arizona Rules of Criminal Procedure (Rules 81-108) the testimony offered to the grand jury could not be released by the express provisions of Rule 107. However, since the prosecution chose to proceed by complaint and preliminary hearing, the testimony will be disseminated because of the defendant's failure to exercise his discretion. This creates an invidious, unjustified discrimination and denies equal treatment to all citizens in the same category in at least two situations.

It is a basic element of due process and of equal protection that a person's rights should not be abridged as a result of the arbitrary exertion of power. See *Leland v. Oregon,* 343 U.S. 790, 72 S. Ct. 1002, 96 L. Ed. 1302 (1952); *Hillard v. Arizona,* 362 F.2d 908 (9th Cir. 1966). Here, the arbitrary selection of a preliminary hearing proceeding instead of a grand jury proceeding has resulted in a substantial likelihood that the defendants' rights to a free trial will be abridged.

The likelihood of an unfair trial in this case can be greatly lessened by the simple exercise of the trial judge's discretion. Very significantly, the discretion of the trial judge has been greatly extended in grand jury proceedings. For example, in *Pittsburgh Plate Glass Co. v. United States,* 360 U.S. 395, 79 S. Ct. 1237, 3 L. Ed. 2d 1323 (1959), the Court held that the disclosure of grand jury minutes in a federal criminal case is primarily within the discretion of the trial judge. This discretion has often been exercised liberally. See, e.g., *United States v. United Concrete Pipe Corp.,* 41 F.R.D. 538, 539 (N.D. Tex. 1966); *United States v. Pilnick,* 267 F. Supp. 791, 801 (S.D.N.Y. 1967). Since the grand jury system has been liberalized to permit the trial judge, in the exercise of his discretion, to provide advantages which are accorded to the defendant who is given a preliminary hearing, we believe that the correlative advantage must be given to the defendant who is taken through the preliminary hearing route: the trial judge must be accorded the discretion to rule that, under proper circumstances, the defendant will be given the substantial rights to which he would have been entitled had he been prosecuted by means of a grand jury. If such discretion is not recognized, the defendants here will be denied basic rights which are given to other defendants who, solely because of an arbitrary decision, are accorded the secrecy of a grand jury proceeding. Such unequal treatment is a flat denial of due process and of equal protection.

V. The Failure of the State Judge to Exercise His Discretion Invades the Appellees' Right to Privacy Which Cannot Be Restored by Any Appellate Process.

We deal with a sensational case in which the reputations of the appellees are likely to be ruined. If there is probable cause, then this is simply a misfortune they will have to

bear in order that the case may be tried. But if there is no probable cause it is simply inexcusable to allow them to be thus traduced by process of law—suffering injuries as to which they will have no recourse whatsoever.

The right to privacy has been recognized by the United States Supreme Court in *Griswold v. Connecticut,* 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965). Justice Douglas ruled in *Griswold* that certain unenumerated rights are created as a result of penumbras which are created by the specific guarantees in the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments. In fact, the existence of such unenumerated rights is specifically recognized by the Ninth Amendment:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

As stated by Justice Goldberg in his concurring opinion:

> "The Ninth Amendment simply shows the intent of the Constitution's authors that other fundamental personal rights should not be denied such protection or disparaged in any other way simply because they are not specifically listed in the first eight constitutional amendments." 381 U. S. at 492, 85 S. Ct. at 1686.

In *New York v. Story,* 324 F.2d 450 (9th Cir. 1963), this Court held that (1) the plaintiff's right to privacy was violated by police officers who circulated photographs taken of the plaintiff in indecent positions under a claim of preserving evidence, and (2) that the plaintiff's right to privacy was actionable in the federal district court under the Civil Rights Act and under the Fourteenth Amendment of the United States Constitution.

See also the concurring opinion of Judge Darr in *Roberts v. Clement,* 252 F. Supp. 835, 848 (E.D. Tenn. 1966), where

the court ruled that a statute was unconstitutional because it made the operation of a nudist colony or engagement in nudist practices a criminal offense:

> "None who make it a point to keep current with United States Supreme Court rulings, particularly recent ones, could have any doubt that the right of privacy is now constitutionally protected. That Court has wisely recognized that the Constitution creates a 'right of privacy, no less important than any other right carefully and particularly reserved to the people.'"

We have an express finding in two courts of great and irreparable injury to the reputations of these appellees unless these hearings should be closed. There is no way of curing this injury; it can only be prevented.

As the Court noted in *Sheppard v. Maxwell, supra,* "we must remember that reversals are the palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception;" 384 U.S. at 363, 86 S. Ct. at 1522. Once a bell has been rung, it cannot be unrung. A permanent injunction should issue from this Court to protect these plaintiffs' constitutional right to privacy.

VI. The District Judge Chose a Sound Remedy.

In formulating its decree, the District Court was aware of conflicting traditional principles and values. On the one hand, as Chief Justice Marshall said in 1824, "It is most true that this court will not take jurisdiction if it should not; but it is equally true, that it must take jurisdiction if it should." *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821). On the other hand, the federal courts will strive mightily "to avoid needless conflict with the administration by a state of its own affairs." Wright, *Fed-*

eral Courts, p. 169 (1963). The District Court sought to solve this problem by entering the following order:

> "Wherefore It Is Ordered that a preliminary injunction issue against the defendants, restraining them from continuing any further open preliminary hearing in the matter now pending in the Superior Court of Arizona in and for the County of Maricopa entitled No. CR. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* pending clarification of the interpretation of Rule 27 of the Rules of Criminal Procedure for the State of Arizona, as amended by the Supreme Court of the State of Arizona.
>
> "In implementation of the foregoing order, Mr. Corbin, County Attorney for Maricopa County, Arizona, and Mr. Martin, Deputy County Attorney for Maricopa County, Arizona, or either of them, are requested to institute appropriate proceedings in order that the Supreme Court of Arizona might have an opportunity to issue an utterance with respect to its interpretation of the Rule 27 as amended."

This was a particularly wise approach in the instant case because, on the face of Rule 27, nothing does interfere with the discretion of a trial judge to determine how to administer his courtroom. The District Court was confronted with a ruling which it obviously thought was an erroneous construction of Rule 27; see Conclusion of Law No. 4, and T. 17 and 18. In view of the fact that the Supreme Court of the State had denied the writ of mandamus without opinion, the Federal District Court chose to subordinate tentatively his own interpretation of Rule 27 to that of the State trial judge.

The District Court has devised its own form of the abstention doctrine to fit this case. On the one hand, the constitutional rights of the appellees are protected until appli-

cation can be made to the State courts. While the federal court could decide the State law question as an ancillary State issue, "The wisdom of exercising such jurisdiction is doubtful." Wright, *supra,* p. 170. By the order of the District Court, the constitutional rights of the appellees are preserved while the State may, if it wishes, apply to a higher State court to determine the matter of State practice. It may be that upon such an interpretation, the constitutional question will disappear and that the instant suit may be dismissed. Yet if the constitutional question must be decided, the order of the District Court makes it ripe for decision. The device chosen by the District Court does as much as can be done to preserve the rights of the individuals on the one hand, and the rights of the State on the other.

CONCLUSION

The petitions for special writs should be dismissed. Treating the main matter as an appeal, the judgment of the District Judge should be affirmed.

Respectfully submitted,

Lewis Roca Beauchamp & Linton

By John P. Frank
John J. Flynn
Robert A. Jensen

Attorneys for Appellee Hooper

Henry J. Florence

*Attorney for Appellee Scroggs**

March, 1968

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*The foregoing counsel also appear for Judge Craig, the nominal respondent in the application for special writs in the matter concerning their clients.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN P. FRANK

(Appendix A Follows)

Appendix A

In the United States District Court
for the District of Arizona

No. Civ-6597 Phx.

Ron Kent Hooper and Purvis Ole Scroggs,
Plaintiffs,

vs.

Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, and the State of Arizona, by Robert Corbin, County Attorney of Maricopa County, Arizona,
Defendants.

FINDINGS OF FACT CONCLUSIONS OF LAW AND ORDER

The above entitled cause came on for hearing before this Court February 26, 1968, upon plaintiffs' complaint for a temporary restraining order and for injunction. There were present counsel for plaintiffs and counsel for defendants. Memorandum in support of plaintiffs' position was submitted February 26, 1968.

Both counsel concurred that, if the presiding judge at the preliminary hearing before the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, had the inherent power to exclude the public in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* then pending, the cause referred to was an appropriate cause for the Court to exercise its discretion in favor of a closed hearing.

Counsel for plaintiffs urged that the presiding judge at the preliminary hearing retained the inherent power to exercise his discretion, for good cause, in favor of a closed

hearing, regardless of the amendment to Rule 27 of the Rules of Criminal Procedure promulgated by the Supreme Court of the State of Arizona.

Counsel for defendants urged that, regardless of whether there was good cause, the presiding judge at the preliminary hearing had no inherent power to exercise his discretion because of the amendment to Rule 27 promulgated by the Supreme Court of the State of Arizona January 29, 1968, effective February 1, 1968, and must, therefore, require that all preliminary hearings must be open to the public.

At the conclusion of the hearing, and on February 26, 1968, this Court entered a temporary restraining order against the Honorable William H. Gooding, Judge of the Superior Court of the State of Arizona, and Robert Corbin, County Attorney of Maricopa County, Arizona, directing said defendants to abstain from any further open preliminary hearing in cause No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs,* until Monday, March 4, 1968, or until further order of the Court.

Thereafter, by stipulation entered into between counsel for plaintiffs and counsel for defendants dated February 29, 1968, the hearing set for Monday, March 4, 1968, to determine whether a preliminary injunction should issue was continued to Friday, March 8, 1968, and is was so ordered March 1, 1968.

On March 7, 1968, counsel for plaintiffs filed a supplemental memorandum. On March 8, 1968, defendants filed their answer with supporting memorandum. The matter was presented and argued to the Court on March 8, 1968. At the conclusion of the hearing, based upon evidence presented, the arguments of counsel and the memoranda submitted, this Court concluded it had jurisdiction of the matter pur-

suant to Title 28 U.S.C. § 1343 and Title 42 U.S.C. § 1983, and the Court ordered that a preliminary injunction issue against the defendants with respect to any preliminary hearing open to the public in the matter of *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs* until such time as the Supreme Court of the State of Arizona might have an opportunity to clarify interpretation of Rule 27 of the Rules of Criminal Procedure as amended January 29, 1968, effective February 1, 1968. At that time the Court further instructed Mr. Martin, appearing on behalf of the defendants, or Mr. Corbin, County Attorney of Maricopa County, to institute appropriate proceedings in order that the Supreme Court of Arizona might have the opportunity to make an utterance clarifying the interpretation of Rule 27. At the same time the Court advised counsel for plaintiffs and counsel for defendants, should they care to have a formal order, they might collaborate for the purpose of presenting a proposed order not inconsistent with what the Court stated orally from the bench.

Thereafter, on March 15, 1968, counsel for plaintiffs submitted a proposed formal order advising counsel for defendants that the matter had been requested to be heard March 18, 1968.

On March 18, 1968, it appeared that counsel for defendants and counsel for plaintiffs could not agree as to the material contained in the proposed formal order. On March 19, 1968, counsel for plaintiffs submitted an amended proposed findings of fact, conclusions of law and judgment, and counsel for defendants submitted objections thereto.

In view of the foregoing recitation of the status of this cause, this Court makes the following findings, conclusions and order in conformity with its oral ruling of March 8, 1968.

FINDINGS OF FACT

1. At the time this action was instituted in this Court a preliminary hearing was pending in the Superior Court of the State of Arizona in and for the County of Maricopa entitled No. Cr. 54087, *State of Arizona v. Ron Kent Hooper and Purvis Ole Scroggs.*

2. Counsel for the defendants in the State Court proceeding moved to the presiding judge at the preliminary hearing to exclude the public from the hearing, stating to the Court the grounds for their motion.

3. The grounds for the motion presented by counsel for the defendants Hooper and Scroggs are set forth in the record of this Court as Exhibit A, attached to plaintiffs' complaint.

4. In response to counsel's motion in the State cause, the County Attorney stated that he could not, in good faith, disagree with the statement presented to the Court by counsel for defendants, except for one point, to-wit: that the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona to the lower courts that all preliminary hearings must be open and that the lower Court had no inherent power to exercise its discretion, for good cause, to close a preliminary hearing (Tr. State Court Proceedings, pp. 8-9).

5. The presiding Judge in the State Court proceeding found:

(a) that in the cause before it there had been substantial pretrial publicity prior to the time of the preliminary hearing;

(b) that evidence would be produced at the preliminary hearing which very well might not be admissible at the time of trial, if there was a trial;

(c) that one of the defendants in the cause before it was a professional man; that the other was a businessman; that any publicity in connection with the matters then before the Court would be detrimental to their professional and business reputations, and affect their livelihoods;

(d) that the amendment to Rule 27 of the Arizona Rules of Criminal Procedure constituted a mandate from the Supreme Court of Arizona that the Superior Court of Arizona, or a Magistrate could not in its discretion exclude all persons from a preliminary hearing.

6. Subsequent to the decision of the Superior Court of the State of Arizona in and for the County of Maricopa hereinabove referred to, counsel for the defendants made application to the Court of Appeals of Arizona for a writ of mandamus, directing the Superior Court to close the preliminary hearing to the public.

7. The record discloses that the Court of Appeals of Arizona did not accept the application for the writ, and suggested to counsel that the application be presented to the Supreme Court of the State of Arizona.

8. Upon presentation of the application to the Supreme Court of Arizona, the Court denied the application without comment.

9. Counsel for the defendants in the State action then instituted these proceedings before this Court.

10. Based upon the findings of the presiding judge in the State Court proceeding, and the record in this Court, this Court further finds that there has been substantial pretrial publicity prior to the preliminary hearing in the State Court.

11. This Court further finds that there will be a likelihood of the presentation of evidence at the preliminary hearing in the State Court which may very well not be ad-